

**United States Postal Service and Roy Palmer. Case
10-CA-15797(P)**

May 28, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On January 12, 1982, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, the Respondent filed certain exceptions, a supporting brief, and a brief otherwise supporting the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, United States Postal Service, Atlanta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

BENJAMIN SCHLESINGER, Administrative Law Judge: This proceeding was heard on December 10, 1980, in Atlanta, Georgia, before Administrative Law Judge Robert Cohn, now deceased. On December 23, 1981, Chief Administrative Law Judge Melvin J. Welles designated me to determine the issues presented herein and render a decision based on the record made, all parties having agreed to that procedure.

Upon reading the record and upon consideration of the briefs filed by the General Counsel and Respondent, I hereby render the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The complaint¹ alleges that Respondent United States Postal Service violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* (the Act), by suspending employee Roy Palmer from December 23 to 29, 1979, and by denying him a "step increase" on March 8, 1980. The National Labor Relations Board has jurisdiction over this matter by

virtue of Section 1209 of the Postal Reorganization Act, 39 U.S.C. § 101, *et seq.*

Palmer acted as steward and alternate steward for the Mailhandlers Local 310, National Post Office Mail Handlers, Watchmen, Messengers, and Group Leaders Division of the Laborers' International Union of North America, AFL-CIO (The Union). Although there is some dispute as to how many grievances he filed on behalf of himself and other employees, clearly he was vociferous, persistent, and outspoken in attempting to ensure that the contractual terms of the Union-Respondent collective-bargaining agreement (agreement)² were complied with and that his and his fellow employees' rights were protected. Whether his filing of grievances led to the discipline imposed by Respondent is the issue herein.³

On December 7, 1979, Palmer asked his supervisor, Sylvester Price, for permission to leave his work station in order to make a telephone call. Palmer testified that his request was accompanied by a request to use the restroom, and his request to use the telephone was denied by Price because of the amount of work then required to be performed.⁴ Returning to work, Palmer, within a minute or two, felt compelled to go to the bathroom, and did, despite Price's denial of permission to do so. Within a minute of Palmer settling in a stall, employee and Union Administrative Vice President L. C. Cunningham entered the bathroom, called out Palmer's name, and Palmer identified himself from behind the closed door. Two minutes later, Cunningham returned and informed Palmer that he had 5 minutes to complete his appointed task—otherwise, Price was going to clock him out and have the security forces escort him from work. Unfortunately for Palmer, he took 8 minutes and was ordered to clock out. As a result, Palmer grieved, claiming a loss of 2-1/2 hours' straight pay and 2-1/2 overtime hours.

Predictably, Price's story was different. Palmer asked only for permission to use the telephone, but, due to the fact that his work areas was very busy, Price refused Palmer's request. Although Palmer started to return to work, he was furious about Price's decision and determined to make the telephone call anyway, heading toward a facility where phones were located. Price, concerned that his orders were being ignored, sent Cunningham after Palmer and directed that Palmer be informed to return to work under penalty of being clocked out (but not of being escorted from the premises).

² The agreement provides for a multistep grievance procedure, which commences with an informal discussion by the grievant with his supervisor. Thereafter, and providing that the grievance has not been adjusted, the following steps are provided for: (1) presentation of written grievance to the supervisor; (2) appeal to Respondent's employee labor relations area; (3) appeal to Respondent's regional level in Memphis, Tennessee; and (4) arbitration.

³ Respondent alleged at the hearing some doubt of Palmer's status as steward or alternate steward, based on the Union's possible failure to certify him as such, as required by the agreement. However, there is little record support that Respondent refused to accept Palmer's grievances or confer with him under the agreement's grievance procedure on the ground now raised.

⁴ Palmer did not testify that Price denied him the right to go to the bathroom.

¹ The complaint issued on June 20, 1980, based on an unfair labor practice charge filed by Roy Palmer on May 5, 1980.

The suspension for the remainder of December 7 is not alleged in the complaint as a violation of the Act. Seemingly, that matter has been settled under the agreement's grievance machinery.⁵ What is complained of is that at a meeting on December 18 pursuant to the grievance procedure, when Palmer and Richard Fambrough, his union representative and another steward, insisted on pursuing Palmer's grievance, Price announced (according to Palmer): "I see that you are going to insist on filing this grievance and pursuing this matter. Then here is something for you."⁶ Price then handed Palmer a letter announcing Palmer's suspension for 7 days, which was later through step 3 of the grievance procedure reduced to make Palmer whole for 3 days' pay.

It is that suspension which constitutes the first allegation of this proceeding, the General Counsel contending that the suspension was given by Price in retaliation for Palmer's filing and continuing to process his grievance and in violation of Palmer's rights to engage in concerted and protected activities. It is well settled that discipline of an employee for attempting to file or filing a grievance is prohibited by Section 8(a)(1) of the Act. *N.L.R.B. v. Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962); *Walls Manufacturing Company, Inc. v. N.L.R.B.*, 321 F.2d 753 (D.C. Cir. 1963); *Hoover Design Corporation v. N.L.R.B.*, 402 F.2d 987 (6th Cir. 1968); *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028 (1976); *The Detroit Edison Company*, 241 NLRB 1086 (1979). Complaints of this nature are concerted because they involve the implementation and enforcement of a labor agreement which is an "extension of the concerted activity giving rise to that agreement," protected by Section 7 of the Act. *Merlyn Bunney and Clarence Bunney, partners, d/b/a Bunney Bros. Construction Company*, 139 NLRB 1516, 1519 (1962). This is so even though the employee's grievance may lack merit. *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enf'd. 388 F.2d 495 (2d Cir. 1967); *John Sexton & Co., A Division of Beatrice Food Co.*, 217 NLRB 80 (1975).

Respondent contends, however, that the suspension was merely the result of Palmer's refusal to follow his supervisor's direct order, and nothing else. If the 7-day suspension was so aimed, it is difficult to understand why Price also suspended Palmer on December 7 for the same offense, but for a shorter period. Palmer kept insisting that the 2-1/2-hour suspension violated the agreement because employees were entitled to use the bathroom. In all the grievance sessions involving the earlier

suspension, Price insisted that the discipline was given because Palmer refused to comply with Price's order to return to work.⁷ The second suspension was merely duplicative, although more harsh, and arguably an afterthought, as Price insists. But it appears to be more than that, because the timing of the delivery of the second suspension, only after Palmer insisted on pursuing his grievance, was inadequately explained by Price.

There was an 11-day delay between the first suspension of December 7 and the second, dated December 18. Price testified that he finally decided 2 or 3 days after December 7 that further discipline was warranted and that his proposed suspension letter had to be given to his supervisor for review, a process that normally takes an additional 2 or 3 days. Because the letter was given to Supervisor Lester on December 10, there is accounted for at best 6 days, leaving 5 days for the delivery of the suspension to Palmer. But Price did not deliver it until the step 1 meeting, and only after the Union had determined to process it and not to withdraw it pursuant to Price's suggestion. Those events lend credence to the General Counsel's complaint that the second suspension was served only because Palmer was determined to proceed with his grievance over the first suspension. Price's utter failure to reasonably explain his delay in serving the second suspension at any earlier time supports the inference of a violation of Section 8(a)(1) of the Act. I so conclude.

The General Counsel also contends that the 7 days' suspension resulted from Respondent's discrimination against Palmer's grievance filing activities as a union steward, an 8(a)(3) and (1) claim which constitutes the basis for the second allegation of the complaint. On February 12, 1980, Price gave Palmer a letter, dated February 4, 1980, notifying Palmer that his step increase due on March 8 would be deferred for 7 pay periods. Because a pay period consists of 2 weeks' work, the increase was due to be paid on March 27, when Respondent's payroll records reflect that it was paid.⁸ However, the payment was due to yet another of Palmer's grievances, this time objecting to the deferment on the grounds, in part, that Respondent's own manual dealing with step increases required that denial of step increases not be used as punishment for overt acts and that supervisors must keep their employees informed of their work performance, neither of which, Palmer alleged, had been complied with by Price.

Whether those reasons caused Respondent to reverse Price's deferment of Palmer's step increase, or whether Price found that Palmer improved his work performance, the latter being the reason relied upon by Respondent, Respondent nonetheless advised the Union on March 12 that Palmer would receive his increase, effec-

⁵ The General Counsel claimed at the beginning of the hearing that he was seeking 2-1/2 hours' pay as part of his requested remedy. This relates solely to the December 7 suspension which was adjusted by the Union and Respondent requiring payment to Palmer, who denied that he was made whole. However, this suspension was not specifically alleged in the complaint, and no motion was made to amend the complaint to allege a violation at the hearing or in the General Counsel's brief. Respondent's counsel was under the impression during the hearing that only the two specific allegations of the complaint were at issue; and, with one modification, I will consider myself bound by the specific allegations of the complaint.

⁶ The recollections of Union Steward Fambrough were not quite as graphic. The statements attributed to Price were: "You gave me a step one on this, I have something for you"—which Fambrough understood to mean that if Palmer had not decided to pursue his grievance, the 7-day suspension would not have been served.

⁷ By so finding, I credit Palmer's and Fambrough's recollections that there were two grievance discussions prior to that of December 18, in light of Price's lack of recollection. I also find that, on December 18, Price rejected Palmer's grievance. It is improbable that Price would have needed time to consider whether his first suspension of Palmer was justified, especially in light of his delivery to Palmer of the second suspension.

⁸ Palmer claimed that his own payroll slips demonstrated that he was not timely paid his increase, but the slips were never introduced.

tive March 8. I conclude that Respondent did not deny Palmer a step increase, as alleged in the complaint. However, at least from February 12 to March 12, 1980, Palmer had been threatened with the denial of his increase, and he had to grieve in order to protect his contractual rights. I consider this threat to have been subsumed in the complaint's allegation; and, because it was fully litigated and directly stems from the heart of the allegation concerning the deferment of the increase, I shall dispose of the threat to defer the step increase. *Southwestern Bell Telephone Company*, 237 NLRB 110 (1978).

The threat raises the difficult and oft-encountered question of what Price's motivation was, that is, unless Price was motivated by reasons which are illegal under the Act, Respondent is otherwise entitled to discipline an employee for good reason, for bad reason, or for no reason at all. *Edward G. Budd Manufacturing Co. v. N.L.R.B.*, 138 F.2d 86, 90 (3d Cir. 1943), cert. denied 321 U.S. 778 (1943). Price contended that Palmer, whose work in the past was dependable and productive, had been "slacking off," and, contrary to Palmer's testimony, stated that he consulted with Palmer and sought corrective action. The threat to defer his step increase was intended to prod Palmer to regain his prior admirable work habits.

On the other hand, Palmer denied that he had been counseled by Price and that his conduct did not justify the discipline of a denial of an increase. The General Counsel relies on Palmer's testimony and the following arguments to support his contention that the threat was merely a retaliation for Palmer's grievance filing activities on his own behalf as well as a union steward on behalf of other employees. First, Palmer was once reassigned from the mail chute where he customarily worked to the non-machineable objects area, where (Price knew) Palmer did not like to work and where, Palmer testified, assignments were based on seniority. However, Larry Jones, an employee of 10-1/2 years,⁹ testified that the rotation was normal, that he had been reassigned to the area about which Palmer complained, and that Palmer was not assigned to work there any more than other employees. No one, including the other union representatives, corroborated Palmer's testimony that such assignments were based on seniority, and Price testified that assignments were based solely on need. Further, he testified that it would be counterproductive to assign Palmer to an area where he did not like to work, because he would not work there. In light of these facts, I find it improbable that the one related incident of Palmer's reassignment for a rather short time is sufficient to demonstrate discrimination against him for any reason.

Second, Palmer complained that Price ordered him not to clock in prior to storing his lunch and clothes in his locker. Price testified credibly that Palmer showed up late that day, and he had previously announced to all employees that they were misusing the clocking-in procedure by doing other things after clocking in when they should have been ready for actual work. No employee or union representative contradicted Price's testimony, which I credit.

⁹ Palmer was first employed in August 1978.

Third, the General Counsel relied on the events of December 7 to prove that Price was motivated by Palmer's illegal activities. Although I have found that the 7-day suspension violated the Act, having been meted out because of Palmer's continued pursuance of his grievance over the events of December 7, I do not find that Price's actions of December 7 violated the Act. Rather, his claim that Palmer became surly because he was not given permission to use the telephone is supported by just as much evidence as is Palmer's assertion that he was disciplined for going to the bathroom. Indeed, although Palmer did in fact go to the bathroom, he did not have to seek Price's permission to do so. Normally, he would merely report that he was leaving to a fellow employee, and employee Stanley Gore testified first (in answer to questions posed by the Administrative Law Judge) that Palmer did not do so, and only on recross-examination by the General Counsel did he testify that Palmer did so. At best, the General Counsel did not prove by a preponderance of the evidence that the 2-1/2-hour suspension was given because Palmer had a propensity to file grievances.

Fourth, the General Counsel points to the extent of Palmer's grievance filing activities. I note that Union Representatives Cunningham and Fambrough appealed almost three times as many grievances to step 2 than did Palmer. There is no evidence that they were disciplined or at all discriminated against because of their activities.

Fifth, the General Counsel argues that there is no substance to Price's February 1980 appraisal of Palmer, because Price had given Palmer a favorable evaluation on September 11, 1979. However, that report was given 5 months before, and surely it is possible that Palmer's work habits could have changed for the worse in the interim. Further, as Respondent accurately notes in its brief the General Counsel's theory of this case is weakened by the fact that, before Price's favorable evaluation of Palmer, Palmer had filed numerous grievances, two complaining that Price did not allow him time to carry out his duties as a union steward. If Price were motivated by any intention to discriminate against Palmer, surely he would not have later given Palmer the glowing performance rating. Finally, even though Palmer denied that there was anything wrong with his work and that Price ever counseled him, I note that he requested in a January 1980 letter¹⁰ that "Price refrain from telling other employee[s] about my work performance which he have done on several occasion[s]."

Finally, I am persuaded that Palmer was not wholly credible; rather, that he was easily hurt by any action he believed to be adverse to him and used as a scapegoat for criticisms of his work, his union activities, his color, his sex, and his religion. Thus, with respect to some of the events at issue herein, he charged Price and Respondent with discrimination in violation not only of the Act but also of the Equal Employment Opportunity Act.

¹⁰ This letter was originally written by Palmer to Respondent's general manager, Henry Woodard, complaining of Price's harassment of him. Palmer testified that he did not deliver the letter to Woodard but gave it to the Union, and he could not explain how it was received by Respondent. The letter will be hereinafter referred to as the "Woodard letter."

Nothing that he did resulted from his own shortcomings. Other employees were allowed to use Price's locker for storing their own clothes, but not Palmer.¹¹ Other employees came to work drunk, and their inability to work was overlooked, but Palmer was constantly picked on. Only Palmer was not allowed to function as a union steward.

I have the distinct impression that Palmer was not candid when narrating the incidents of December 7. There is no doubt that he sought to use the telephone that day, as he admitted during his testimony, but that admission was glaringly omitted from his written grievances when he stated that he sought only permission to go to the bathroom,¹² permission which all witnesses agreed did not have to be sought. His explanation of the reason he went to see Price the second time, when he merely had to use the restroom, was entirely improbable; and I find that the second conversation must have involved more than what Palmer was ready to concede. Rather, I find it probable that Palmer was disturbed by Price's refusal to permit him the use of the telephone, and he expressed his displeasure by going to the bathroom and absenting himself from work. At least, there is sufficient basis in this record for a conclusion that Price's first suspension letter and later threat of discipline were not motivated by Palmer's grievance filing activities.¹³

It may well be that Price's threat to defer Palmer's step increase and discipline of Palmer for disobeying orders may not have been contractually correct,¹⁴ but neither proves by a preponderance of the evidence that Respondent was motivated by Palmer's activities as a union steward, in violation of Section 8(a)(3) of the Act or, except as otherwise found herein, by his filing of grievances, in violation of Section 8(a)(1) of the Act. Accordingly, I will dismiss the remaining allegations of the complaint.

THE REMEDY

Having found that Respondent engaged in one unfair labor practice, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In particular, having found that Respondent suspended

¹¹ Price testified that Palmer had his own locker and could place his belongings there. Other employees had not been assigned lockers, and those Price permitted to use his locker.

¹² In the Woodard letter, he related what transpired on December 7, but certain words had a line drawn through them, as follows: "On that same day Dec. 7th 1979 at 1:35 p.m. I came to Mr. Price and ask could I have permission to go used to the bathroom and while I'm there may I also used the phone to make and emergency phone called, Mr. Price said that I couldn't go to the bathroom nor used the phone." [Italicized words had lines drawn through them in original text.] Palmer denied crossing out these words, but I find that improbable, even though his testimony was not rebutted by Respondent. I see no reason why Respondent would wish to alter Palmer's letter to eliminate the one reason, it alleges, he sought permission to leave his work. Rather, I find it likely that Palmer was attempting to keep consistent his story that he merely requested to use the bathroom, permission for which was denied by Price.

¹³ Palmer apparently believed so, too. In the Woodard letter, he blamed Price's animosity towards him on (1) his religion, and (2) the fact that Price received gifts from other employees, but not Palmer.

¹⁴ In fact, Palmer did go to the bathroom on December 7, a right which Price said Palmer had and which, Price knew, Palmer exercised, because Price was so told by Cunningham.

Palmer because of the protected and concerted activities in which he was engaged, I shall recommend that Respondent make him whole for any loss of earnings or any monetary loss he may have suffered as a result of Respondent's unlawful conduct, less interim earnings, if any. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), together with interest computed in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977).¹⁵ In addition, I shall recommend that the notice of suspension, dated December 18, 1979, be removed from Palmer's personnel file and expunged from Respondent's records.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁶

The Respondent, United States Postal Service, Atlanta, Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees by suspending them for engaging in protected and concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make Roy Palmer whole for any loss of earnings he may have suffered as a result of his illegal suspension by Respondent from December 23 to 29, 1979, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from the personnel records and files of Roy Palmer the notice of suspension, dated December 18, 1979, and all references to it.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in Atlanta, Georgia, copies of the attached notice marked "Appendix."¹⁷ Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Re-

¹⁵ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

¹⁶ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹⁷ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges unfair labor practices not found herein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interfere with, restrain, or coerce our employees by suspending them for engaging in protected and concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL make Roy Palmer whole for any loss of earnings he may have suffered as a result of his illegal suspension by us from December 23 to 29, 1979, with interest.

WE WILL expunge from our personnel records and files of Roy Palmer the notice of suspension, dated December 18, 1979, and all references to it.

UNITED STATES POSTAL SERVICE